STATE OF MICHIGAN

IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC, Plaintiff/Cross-Defendant/Appellant, v VAN DYKE SC PROPERTIES, LLC, Defendant/Cross-Plaintiff/Appellee.	Supreme Court No. 153979 Court of Appeals No. 326486 Sanilac County Circuit No. 14-035490-CH

AMICUS CURIAE BRIEF OF
MICHIGAN BANKERS ASSOCIATION
AND
MICHIGAN CREDIT UNION LEAGUE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

Whether a prescriptive easement, which has vested upon the expiration of the 15-year limitations period, runs with the dominant estate to subsequent purchasers and mortgagees if the previous owner did not take judicial action or refer to the easement in an instrument of conveyance or parol statements?

The circuit court answered: Yes.

The Court of Appeals answered: No.

Appellant Marlette Auto Wash, LLC, answers: Yes.

Appellee Van Dyke SC Properties, LLC, answers: No.

The Michigan Bankers Association and Michigan Credit Union League, as amici curiae, answer: Yes.

STATEMENT IDENTIFYING INTEREST AS AMICI CURIAE

The Michigan Bankers Association, which was founded in 1887, is a nonprofit trade association serving Michigan's banks. The MBA is the premier trade organization for Michigan's banking industry. Its members have more than 3,000 branches located throughout the state and have combined assets of more than $200 billion. The MBA strives to advance a positive business environment for the Michigan banking industry and to foster safe, profitable, and successful banks, which in turn promote strong communities and a vibrant Michigan economy. It acts as the official representative of member banks in matters of law and regulation affecting their interests and the banking industry as a whole.

The Michigan Credit Union League, a nonprofit trade association organized in 1934, is the state's only trade organization for the credit union community in Michigan. The MCUL represents 245 state and federally chartered credit unions with over 1,000 branches, more than five million members, and $55 billion in assets. The MCUL's mission is to strengthen the credit union community and its image by providing advocacy on important issues, coordinating cooperative initiatives, and by providing high-quality solutions that help credit unions succeed and enrich the lives of their members.

The MBA and MCUL are interested in the legal standards governing prescriptive easements because their members are vital providers of mortgages to Michigan's citizens and property owners. As lenders, banks and credit unions must be able to reasonably appraise the properties used to secure mortgages and, when necessary, to sell foreclosed properties at fair value. The value of a property can be significantly affected by the existence of easements, whether as a benefit to the dominant estate or as a burden on the servient one.

The MBA and MCUL believe that Michigan lenders and property owners are better served by the longstanding rule that a prescriptive easement, which results from fifteen years of open, notorious, adverse, and continuous use of another's property, vests when the statute of limitations expires. As vested interests, the prescriptive easements run with the servient estate to mortgages and subsequent purchasers. The added requirement created by the Court of Appeals puts lenders and property owners at risk. The transfer of prescriptive easements should not depend on the decisions of easement owners to either take judicial action or refer to the easement in instruments of conveyance or parol statements.

STATEMENT OF FACTS

The MBA and MCUL rely on the statement of facts in the application for leave to appeal.

ARGUMENT

Until the Court of Appeals issued its decision in this case, courts across the country unanimously agreed that an after-acquired easement—including one created by prescription—automatically inures to the benefit of the dominant estate's mortgagee and a subsequent purchaser of that estate in a foreclosure sale. This well-established rule serves the mortgage industry and markets well by reducing the mortgagee's transaction costs, aligning the interests of the mortgagor and mortgagee, protecting the value of the mortgagee's collateral, and ultimately minimizing risk of loss in the foreclosure process.

Improvidently relying on a few words from a passage in *Gorte v Dep't of Transportation*, 202 Mich App 161; 507 NW2d 797 (1993), the panel in this case added a new and unwise restriction to the existing rule. In *Gorte*, the Court of Appeals recognized

"the general view with respect to adverse possession that, upon the expiration of the period of limitation, the party claiming adverse possession is vested with title to the land, and this title is good against the former owner and against third parties." 202 Mich App at 168. The Court continued, stating that "Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession." *Id.* (citing *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932)). "[O]ne gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought." *Id.* at 168-169.

The panel in this case emphasized the highlighted words in a sentence from *Gorte*: "the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in *the party* claiming adverse possession." [Unpub op at 3 (quoting *Gorte*, 202 Mich App at 168)] From that, the Court devised a rule that title to the prescriptive easement does not run with title to the dominant estate unless the previous owner "asserted a claim of prescriptive easement with regard to [the] property acquired through prescription," either through judicial action or by referring to the easement in the instrument of conveyance or parol statements. [Unpub op at 3]

Applying this newly established rule, the prescriptive easement serving as the only useful access into a car wash failed to transfer from the car wash's prior owner, Lipka Investments, to the mortgage lender, Tri-County Bank and its holding company GLWC, and as a result, did not pass to the subsequent purchaser, Marlette Auto Wash. The vested title to the prescriptive easement evaporated for lack of a quiet-title action, deed reference, or parol statement by Lipka. [Unpub op at 2-3] The consequence is that the existing car-wash

bays will now have to be destroyed for customers to access the property, at what appears to be great cost to the current owner who purchased the foreclosed property from the mortgagee. The necessary implication of this holding is that a mortgagee wishing to preserve an unrecorded yet essential prescriptive easement must either pursue litigation to quiet title in the easement or obtain a proper deed or parol statement from the mortgagor. And those latter steps must apparently be accomplished at the time of foreclosure when the interests of the mortgagor and mortgagee are adverse and their relationship is commonly hostile.

The decision in this case not only undermines the black-letter law regarding vesting of prescriptive easements and the passage of title to subsequent purchasers, it also unfairly disadvantages the mortgagee. Requiring a mortgagee to first investigate and determine that a prescriptive easement has been created, and then obtain the cooperation of the foreclosed-upon, and often hostile, mortgagor imposes an unreasonable and unnecessary burden upon the mortgage-lending industry. Worse, if the value and beneficial use of the mortgaged property are dependent on the prescriptive easement, the defaulting mortgagor gains a bargaining chip that can be played for advantage against the mortgage lender. The mortgagor could refuse to take the steps that the Court of Appeals ruled were necessary to pass title to the prescriptive easement unless the mortgagee acceded to some demand.

If the decision in this case stands, mortgage lenders will either have to incur the cost of adjusting their lending and foreclosures practices in response, or risk greater loss in foreclosure. This case is not an anomaly. The issue presented has percolated up to the Court of Appeals three times this year alone, and only once was the question correctly

analyzed.[1] This Court should therefore take this opportunity to correct the panel's inaccurate understanding of the language in *Gorte* and confirm the rule universally applied in every other jurisdiction: that once a prescriptive easement vests upon 15 years of continuous, open, notorious, and adverse use, it will then run with the land like any other easement appurtenant, without judicial action, and even without a reference in a deed or parol statement.

I. The Court of Appeals' ruling is contrary to the black-letter law that a vested prescriptive easement passes to the mortgagee and subsequent purchasers in a foreclosure sale.

For over a century, the common law has been that an easement appurtenant created or acquired after executing a mortgage on the dominant estate passes to the mortgagee or a purchaser in a foreclosure sale:

> [T]he cases are agreed that an easement appurtenant to land, created or acquired by a mortgagor or his grantees subsequent to the execution of the mortgage on the dominant estate, passes under the mortgage, although not specifically mentioned therein, and inures to the benefit of the mortgagee, or of a purchaser at the foreclosure sale and his grantees.

Anno, *Easement Appurtenant to Land, Created Subsequent to Mortgage of Dominant Estate, as Inuring to the Benefit of the Mortgagee or of Purchaser at Foreclosure Sale and His Subsequent Grantees*, 116 ALR 1078, 1079 (1938)(citing numerous cases).

[1] The other two cases are *Lamkin v Hartmeier*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 1, 2016 (Docket No. 326986), and *Methner v Village of Sanford*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 23, 2016 (Docket No. 326781). In *Methner*, the panel correctly stated that "if the use by plaintiffs' predecessor in title . . . satisfied the elements of a prescriptive easement, then plaintiffs acquired that easement when they purchased the property, even if it was not mentioned in the deed or the parties' dealings." Op at 2.

The rule applies with full force to *prescriptive* easements appurtenant. See, e.g., *Boccanfuso v Conner*, 89 Conn App 260, 268; 873 A2d 208 (2005) ("[A] prescriptive easement appurtenant to the benefited property generally runs to all subsequent owners thereof."); *Lemont Land Corp v Rogers*, 269 Mont 180, 183; 887 P2d 724 (1994) (a prescriptive easement, once established, "is not divested by the subsequent transfer of the servient estate"); see also Bruce & Ely, *The Law of Easements & Licenses in Land,* § 9:1 (2016).

This rule follows naturally from two principles that Michigan shares with other jurisdictions. First, appurtenances to mortgaged land acquired after the mortgage is executed become subject to the mortgage lien and title to them passes with the realty. *Sequist v Fabiano*, 274 Mich 643, 646; 265 NW 488 (1936); *Tyler v Hayward*, 235 Mich 674, 676; 209 NW 801 (1926). "Such a result is an application of the doctrine that a mortgage lien automatically covers fixtures and improvements subsequently made on the land." Bruce & Ely, § 9.11. Second, "[o]nce established, the [prescriptive easement is] an easement appurtenant." *Haab v Moorman*, 332 Mich 126, 143-144; 50 NW2d 856 (1952). Like fixtures or other appurtenances, prescriptive easements "therefore pass[] by the deed of the dominant estate although not expressly mentioned in the instrument of transfer, and even without the word 'appurtenances.'" *Id.*, 332 Mich at 143-144. "Appurtenant easements acquired by prescription are, of course, transferred with the dominant estate." Bruce & Ely, § 9.1.

The Court of Appeals' ruling, i.e., that the car wash's prescriptive easement did not transfer with the deed in lieu of foreclosure to Tri-County Bank, cannot be reconciled with this black-letter law. If the panel's reasoning is that no easement is actually "established"

(even if vested) until judicial action is taken, that is not the rule in this state. "To establish an easement by prescription there must be: (a) Continued and uninterrupted use or enjoyment; (b) identity of the thing enjoyed; (c) a claim of right adverse to the owner of the soil, known to and acquiesced in by him." *Roberts v Wheelock*, 237 Mich 689, 690; 213 NW 72 (1927). Judicial action has never been one of the requirements. Nor does it make sense to hold that an easement is not "established" unless and until it has been judicially declared, when title has already vested in the adverse user based on expiration of the 15-year limitation period. [Unpub op at 4 (citing *Gardner,* 257 Mich at 176)]

II. The Court of Appeals' decision imposes an unreasonable burden on mortgage lenders and undermines their right to foreclosure.

Not only is the decision contrary to the common law on prescriptive easements, it derives a rule from a few words in *Gorte* that is both bad policy and unfair to the mortgage-lending industry. It is often the case that purchasers and creditors will "act on the basis of the apparent ownerships suggested by the actual uses of the land." Restatement (Third) of Property (Servitudes), § 2.17 (2000). That was certainly the case here, since it was obvious when Lipka purchased the property and obtained a mortgage that the only meaningful access in the property's current configuration was through the shopping center parking lot, although there was no deed establishing this access. [Trial Ct Op at 1-2] The prescription doctrine was designed in large part to "protect the expectations of purchasers *and creditors* who act on the basis of the apparent ownerships suggested by the actual uses of the land." Restatement, *supra*, § 2.17, Comment c (emphasis added). Though the Court of Appeals' decision does not eliminate *all* possibility of maintaining that protection, it places a substantial premium and great uncertainty on it by requiring the mortgagor to persuade

the mortgagee to preserve the prescriptive easement through litigation or by inducing the adversarial mortgagee to cooperate in the foreclosure.

The Court of Appeals required one of three conditions to be met for the vested prescriptive easement to transfer to Tri-County Bank and subsequent grantees. First, if Lipka, the defaulted mortgagor, had "asserted a claim of prescriptive easement," this would have presumably satisfied the Court of Appeals. [Unpub op at 4] As the mortgagee, Tri-County Bank could not force Lipka to file such a claim, thus leaving the defaulted mortgagor with control over whether this option would be pursued and the easement preserved in the foreclosure and subsequent sale. It is unclear whether the Court of Appeals would have found this assertion-by-judicial-action condition satisfied if the mortgagee itself brought a claim. But that would of course require the lender to be aware of easements that arose after the mortgage was executed, determine their necessity for ongoing use of the property, and incur the cost of litigating the issue if they are. Even if a mortgage lender could protect its interests in this way, this course would impose substantial transaction costs in both obtaining such information about the collateral and pursuing the litigation.

Second, the Court of Appeals apparently would have held the vested easement to be transferred if the defaulted mortgagor had referenced the easement in its deed in lieu of foreclosure, satisfying one of two alternatives for tacking. [Unpub op at 4][2] This necessarily places all control over the passing of the easement to the mortgagee in the hands of the mortgagor. Some defaulted mortgagors will cooperate in the foreclosure, but

[2] As explained by Marlette in the application for leave, the tacking doctrine relates to the way that a claimant can establish the requisite 15 years adverse use. Tacking is not required if title to the easement vests when the statute of limitations expires following one owner's use. Application, p 11 (citing *Haab*, 332 Mich at 11).

that is the exception rather than the rule. Most mortgagors refuse to participate in the process, or are absent altogether. Many oppose it, and some do so with great hostility. It is entirely unreasonable to make the mortgagee's interests depend on an expectation that the mortgagor will bring this issue to the lender's attention in the first place, much less cooperate by providing a deed that refers to the easement.

Third, the Court of Appeals would supposedly have accepted parol statement at the time of conveyance as another option for tacking. [Unpub op at 2] This solution likewise vests all control over the transfer of a vested and essential easement in the foreclosed-upon, and sometimes hostile, mortgagor. It suffers from the same infirmity as the deed-reference option for exactly the same reasons.

Allowing the mortgagor to dictate whether a prescriptive easement appurtenant passes to the mortgagee in foreclosure is grossly unfair to the mortgagee. The unfairness is particularly great in a case such as this, where the easement has become necessary to continued functional use of the property as a car wash. Without the access through that easement, the value of Tri County Bank's collateral would be significantly diminished, since any purchaser would be forced to incur substantial expense to create alternative access. In this case, the subsequent purchaser would be required to destroy other appurtenances such as the existing car-wash bays to carry on the business. There is a very real possibility that individuals and entities would be reluctant or unwilling to purchase property out of foreclosure under these circumstances to the further detriment of mortgagees.

A mortgagee should not be required to rely upon its adversary in the foreclosure process to retain the full value of its collateral, nor should the mortgagor be allowed to hold

the prescriptive access over the mortgagee's head to obtain a better deal in the foreclosure process. Yet the Court of Appeals' decision leads directly to this result.

III. Allowing vested prescriptive easements to run with the property according to the black-letter rule does no real harm to servient estate owners or title insurers.

As amicus, the Real Property Law Section raises a concern about the effect applying the black-letter law might have on bona fide purchasers and their title insurers. [Brief of Real Property Law Section, p. 15] That concern is not at issue in this case for two reasons.

First, Van Dyke SC Properties, the purchaser of the servient estate, was not a bona fide purchaser without knowledge when it acquired the shopping center. Its principal, James Zyrowski, had used the shopping center parking lot to access the car wash for more than 15 years when he operated the car wash. [Trial Ct Op at 3] He was even responsible for constructing the car-wash bays that left the parking lot as the only meaningful access to the car wash. [*Id.* at 1-2]

Second, applying the black-letter rule in this case would not preclude the Court, in a later case with appropriate facts, from considering whether to establish a rule that bona fide purchasers of the servient estate take title free and clear of any unrecorded easement. While the MBA and MCUL believe such a rule would also be contrary to the common law on this issue, it is not a question that is presented in this case.[3] Moreover, the question of

[3] Though the bona fide purchaser principle is "occasionally relied upon to support a holding that a purchaser of land without notice that such land is subject to an easement by implication takes free of the easement, it has rarely, if ever, been interpreted to mean that an easement by prescription once actually in existence can be destroyed by a conveyance of the servient estate even to a purchaser in good faith." Anno, *Extinguishment of Easement by Implication or Prescription, by Sale of Servient Estate to Purchaser Without Notice*, 174 ALR 1241, 1243 (1948). In fact, "[t]here is considerable authority to support the conclusion that an easement obtained by prescription is good as against a subsequent purchaser of the servient tenement even though he is an innocent purchaser without notice." *Id*. at 1244.

whether an unrecorded but vested prescriptive easement survives when there is a transfer of the *servient* estate to a bona fide purchaser is an entirely separate issue from the one presented here. This case is about whether a vested prescriptive easement runs with the land when there is a transfer of the *dominant* estate. There are different considerations between these distinct transactions. Abiding by the universally accepted doctrine that such easements are appurtenant and run with the land will cause no prejudice to bona fide purchasers of dominant estates or their title insurers.

CONCLUSION

As amici, the MBA and MCUL believe that the Court of Appeals' holding creates an intolerable state of affairs for the mortgage-lending industry. Mortgagees should not be left to the mercy of the mortgagor to obtain the benefit of prescriptive easements appurtenant to the estate in a foreclosure sale. Given the impact this case threatens to have on the mortgage-lending industry, the MBA and MCUL urge this Court to grant further review.

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February 13, 2017

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STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN LAMKIN and STEVE LAMKIN,

Plaintiffs-Appellants,

v

EUGENE HARTMEIER, CYNTHIA HARTMEIER, KEVIN HARTMEIER, DENNIS MCCOMB, GLORIA MCCOMB, DANIEL ENGRAM, DANIELLE ENGRAM, JAMES BEAUDOIN, CECILE LAUDENSLAGER, ANGELA CHRISTIE, KIMBERLY KRASKA, JOAN BEAUDOIN, AARON KIRBY, DAMON HARTMEIER, DENISE ENGRAM, DEANN ENGRAM, DEREK ENGRAM, CATHERINE BARRETT,

Defendants-Appellees,

and

RONALD THYBAULT and the Estate of MARY WECKESER,

Defendants.

UNPUBLISHED
September 1, 2016

No. 326986
Livingston Circuit Court
LC No. 12-026600-NZ

Before: FORT HOOD, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's resolution of their claims regarding defendants' use of Island Shore Drive, a private dirt road that wraps around the northwest shore of Oneida Lake[1] in Hamburg Township, in Livingston County. The western end of Island Shore Drive, located in Section 21, leads to and intersects M-36. To the east, Island Shore Drive connects to roads that provide access to lots on the northeast side of the lake, located in Section 22. The

[1] Oneida Lake was originally known as Island Lake.

dividing line between Sections 21 and 22 roughly bisects Oneida Lake. Plaintiffs own a parcel of property in Section 21 through which Island Shore Drive runs, and they contend that defendants, who own lots on the northeast side of Oneida Lake in Section 22, have no right to use Island Shore Drive, and if they did, they have exceeded the scope of any such right. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

From the publicly available records we can find, it appears that in 1853, the relevant property in Section 21 was originally patented to William Placeway, and the relevant property in Section 22 was originally patented to George Galloway. None of the property owned by plaintiffs ever came under common ownership with any of the property owned by defendants. By 1880, Placeway had conveyed the Section 21 property to Thomas Shehan, who split the property into ten lots and deeded an express easement, now known as Island Shore Drive, for access to M-36, to each parcel. At that time, an A. Mercer owned the portion of Section 22 to the northeast of Oneida Lake, then still called Island Lake, and out of that property two platted subdivisions were carved, Cady's Point Subdivision in 1922 and Island Lake Shores Subdivision in 1933. Although no express agreement for access was ever executed, these two subdivisions included internal roads, Point Comfort Drive and Lake View Drive, respectively, that merged together at their respective western ends roughly at the same point as the eastern end of Island Shore Drive, separated by two unplatted parcels. Point Comfort Drive was eventually renamed Schlenker Road. In 1949 the County Road Commission passed a resolution purporting to change the name of Lake View Drive to Island Shore Drive, although in 2005 the Hamburg Township Board of Trustees enacted another resolution purporting to make the same name change.

Plaintiffs assert that the Section 22 properties historically had some kind of access to main roads through the property lying to their east, which was also originally owned by Galloway but was owned by Governor Edwin Winans by the time of the Shehan split and by the Pleasant Lake Hills Corporation and Lakelands Golf Club by the time the Island Lake Shores Subdivision was platted. From the records we have found, there is some hint that there *may* have been access through that property in 1930. However, Mary Ann Lamkin testified that she had thoroughly researched the history of the access situation, and she determined that it was the Lakelands Golf Club that cut off access through its land, whereupon the Section 22 subdivision owners connected their internal roads to Island Shore Drive on the Shehan property. She indicated that from that time, in "the late '40s," the Section 22 subdivision owners accessed their property over Island Shore Drive. However, she also indicated that they may have had access via a sawmill until the Cady's Point Comfort subdivision was revised in 1960. Consequently, the evidence, such as it is, reveals that the Section 22 subdivision owners have been making exclusive use of Island Shore Drive through the Shehan property since at least 1960, and possibly a decade or more longer. It is undisputed that defendants' properties are land-locked and have *legally* been so since the subdivisions were created.

Plaintiffs acquired their property in 1980. We note that plaintiffs, or singularly plaintiff Mary Ann Lamkin, have been involved in a considerable number of prior civil actions involving their efforts, some of which were meritorious, and convicted of several crimes arising out of their prior efforts, to preclude the use of Island Shore Drive by others. See *Lamkin v Hamburg Twp Planning Comm*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2007 (Docket No. 265225); *Read Lumber & Hardware Inc v Lamkin*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2012 (Docket No. 303597); *Lamkin v Engram*,

295 Mich App 701; 815 NW2d 793 (2012); *People v Lamkin*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2013 (Docket No. 308695). Several other criminal appeals were sought, but this Court denied leave for lack of jurisdiction or lack of merit. Plaintiff Mary Ann Lamkin was also found liable for defamation that impliedly arose out of her efforts to halt the expansion of a business that used to operate at the intersection of Island Shore Drive and M-36. *Glazer v Lamkin*, 201 Mich App 432; 506 NW2d 570 (1993). Several of the above cases also involved a business at the same location.[2]

Plaintiffs maintained from the outset that defendants had a right to make use of Island Shore Drive for the limited purpose of gaining ingress and egress between their properties and M-36. At issue was the extent and nature of defendants' use of the easement, not, strictly speaking, whether they could ever use it at all. Consequently, plaintiffs essentially conceded from the outset that defendants had some manner of a prescriptive easement, which, as we will discuss, we would find established by the evidence in any event. The trial court, however, concluded that defendants had acquired a variety of easements by necessity. As we will also discuss, the trial court erred in so finding, although it appears that to some extent the trial court's conclusion may reflect an understandable confusion as to terminology.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Although easement actions are equitable in nature, the precise extent of an easement right held by a party is a factual question reviewed for clear error. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130; 737 NW2d 782 (2007).

The holder of an easement possesses "a right to use the land of another for a specific purpose." *Bowen v The Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). Easements could originally only be created by an express grant. *Coolidge v Learned*, 8 Pick (Mass) 504 (1829); *Frandorson Properties v Northwestern Mut Life Ins Co*, 744 F Supp 154, 156 (WD Mich, 1990). Today, easements can also be established by necessity and by prescription. The concepts are distinct, although "sometimes the same evidence will support either." *Coolidge*, 8 Pick 504; see also *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001). An easement by necessity arises by operation of law where a common owner creates a land-locked parcel, either by conveying a parcel that is land-locked or conveying property such that their remaining property is land-locked. *Schumacher*, 275 Mich App at 130-

[2] We emphasize that some of those matters were meritorious in plaintiffs' favor. The significance is primarily that the use of Island Shore Drive has been contentious and troubling, all the more so for plaintiffs given their unique location on that road. Drawing the conclusion that plaintiffs are generically "litigious" from their understandable and specific concern with the use of Island Shore Drive would be grossly unwarranted.

131. The underlying principle is that unless the parties to the conveyance clearly indicated that they intended otherwise, they are presumed to have intended the land-locked parcel to have a right of access, and an easement by necessity will be limited in scope to, as the name suggests, reasonable necessity, not mere convenience. *Chapdelaine*, 247 Mich App at 172-173.

As noted, the evidence in this matter shows that none of the Section 22 properties ever came under common ownership with the Shehan property. Consequently, no matter what the practicalities of the situation might be, it is legally impossible for any defendants to have any easement by necessity over Island Shore Drive. To the extent the trial court found that defendants had an easement by necessity, the trial court erred and is reversed.

In contrast, an easement by prescription is essentially a matter of adverse possession, except that instead of exclusivity, it requires open, notorious, adverse, and continuous *use* of another's property for the requisite fifteen-year period. *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007); *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010). For the use to be sufficiently "continuous," the continuity need only be consistent with "the nature and character of the right claimed." *von Meding v Strahl*, 319 Mich 598, 613-614; 30 NW2d 363 (1948). An easement by prescription can also be established if the parties intended for a right to be created and subsequently acted as if it had, but for some reason failed to comply with the formalities required to do so correctly. *Mulcahy*, 276 Mich App at 699-700.

There is no evidence that Shehan intended to create any right for the benefit of any parcel of property other than the parcels carved out of his own. Indeed, the Section 22 subdivisions did not exist until long after Shehan made the split that resulted in the creation of Island Shore Drive. Furthermore, there is at least some evidence that when the subdivisions were created, there was no need for the owners of parcels therein to make use of Island Shore Drive, suggesting that the prior common owner of that portion of Section 22 also had no need to make use of Island Shore Drive. Likewise, there is no evidence that any of plaintiff's predecessors in interest ever intended to grant any of defendants' predecessors in interest any rights to make use of Island Shore Drive. Consequently, defendants cannot have a prescriptive easement arising out of an intended but imperfectly created servitude.

Nevertheless, the evidence unambiguously shows that the Section 22 subdivision lot owners have made open, notorious, adverse, and continuous use of Island Shore Drive for ingress and egress between their property and M-36 since at least 1960 and possibly since the late 1940's. There is no dispute that they presently have no other way to do so, and what historical evidence exists comes from plaintiffs themselves, showing that by the time they acquired their property, Island Shore Drive had *already* been the only available route for at least twenty years, well in excess of the requisite fifteen.

Notwithstanding plaintiffs' effective concessions below that defendants had the right to use Island Shore Drive for ingress and egress, they contend on appeal that defendants lack prescriptive easements because they have not *each* shown that they *personally*, or they and their direct predecessors in interest, have used Island Shore Drive for the requisite fifteen-year period. We will consider this argument, because a party generally "is entitled to the benefit of testimony

in support of a verdict in [their] favor despite [their] expression of an opinion inconsistent therewith." *Ortega v Lenderink*, 382 Mich 218, 223; 169 NW2d 470 (1969).

We have found no published opinions expressly addressing the extent to which a party seeking to establish an easement by prescription may rely on uses made by neighbors,[3] and we find the two unpublished opinions that come close to be distinguishable.[4] In *Pamela B Johnson Trust v Camp*, unpublished opinion per curiam of the Court of Appeals, Docket No. 309913 (issued June 4, 2013), this Court addressed whether a party had exceeded the scope of a particular easement, the existence of which was not disputed, and found that whether any other third parties had abused the easement was not relevant to whether the defendant had done so. *Id*., slip op at 2-3. In *Keiser v Feister*, unpublished opinion per curiam of the Court of Appeals, Docket No. 282531 (issued March 2, 2010), this Court concluded that "collective tacking" had never been recognized in Michigan, so a party seeking to establish an easement by prescription could not do so simply by showing that someone in the neighborhood had done so for the requisite period. *Id*., slip op at 6-7. *Johnson Trust* clearly addresses an inapplicable scenario, and although the distinction between this case and *Keiser* is more subtle, that distinction illustrates an important factual consideration in this case.

In particular, although a party seeking an easement right must establish that right by "clear and cogent evidence," *Matthews*, 288 Mich App at 37, there is no particular requirement that that evidence cannot be circumstantial. We cannot find any opinion directly so holding, but we note that the "clear and cogent" quantum of proof is high, but not as high as the "beyond a reasonable doubt" standard required in criminal cases. *McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988). There is no doubt that circumstantial evidence may form the basis of a criminal conviction. See, e.g., *People v Hoskins*, 403 Mich 95, 100-101; 267 NW2d 417 (1978). While we agree with the holding in *Keiser* that a party seeking to establish a prescriptive easement may not "tack" the use made of land by their neighbors, we entirely reject any suggestion that proof of the requisite privity with predecessors must necessarily only be based on direct evidence.[5] See *von Meding*, 319 Mich at 614-615; see also *Gay v Wilson*, 327

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[3] Although we note in passing, the theory being merely tangential to the instant matter, that privity is unnecessary "to employ tacking of holdings to obtain the 15-year minimum under the doctrine of acquiescence." *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964).

[4] Unpublished opinions of this Court are not binding, MCR 7.215(C)(1), and although consideration thereof is disfavored, we may do so and may find them persuasive.

[5] Our dissenting colleague contends that we fail to address case law holding that each party seeking to establish a prescriptive easement must prove privity of estate. We find this baffling, because we agree with those holdings; we simply perceive no reason why such proofs may not rely on inferences and indirect or circumstantial evidence the way *essentially anything else* may usually be used to prove essential factual elements of any other matter. We respect our dissenting colleague's opinion that the evidence introduced here is insufficient, but we respectfully disagree.

Mich 265, 270-271; 41 NW2d 500 (1950). The unusual scenario here illustrates precisely why: the very fact that, for well over twenty years[6] before plaintiffs even bought their property, *there was no other way to gain access to the Section 22 subdivisions*, intrinsically constitutes powerful evidence that *each and every* lot owner—not merely "someone"—*was* making use of Island Shore Drive. That would definitionally include the direct predecessors in interest of each defendant.[7]

Where we disagree with plaintiffs and the trial court is their respective assessments of *how* defendants may make use of Island Shore Drive. It is clear that the easement depends on the *purpose* for which it is being used, not the particular means of conveyance. Obviously, unnecessary dallying, unnecessary noise, unnecessarily destructive maneuvering, and other such frivolities or aggravations beyond what intrinsically accompanies any particular conveyance will overburden the easement. However, beyond that, there is no reason why defendants should have to use a car for ingress and egress if they choose not to. They would be free to make use of walking, bicycling, driving, or whatever other legal[8] form of conveyance they wish within the physical limitations imposed by the path. They are simply not free to do so for any reason or in any way other than for ingress and egress between their lots and M-36. Conversely, just because, say, walking could be perceived as somehow "less burdensome" than driving does not mean it is automatically permitted unless a defendant is walking the easement for the purpose of ingress and egress.

We therefore affirm, to a limited extent, the trial court's finding that defendants enjoy a prescriptive easement for ingress and egress between M-26 and their homes over Island Shore Drive. The limitation, as noted, is that the easement is *only* for ingress and egress; it does not include any right to make use of the easement for recreational purposes. The right of ingress and

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[6] As a general matter, at that point the right to make use of an easement traditionally becomes presumed, and the owner of the servient estate must show that such usage was permissive. *Haab v Moorman*, 332 NW2d 126, 144-145; 50 NW2d 856 (1952). This does not, of course, shift the ultimate burden of proof, but it does establish that the jury may draw certain inferences. *Widmayer v Leonard*, 422 Mich 280, 289-291; 373 NW2d 538 (1985).

[7] In *Keiser*, the sought-after easement involved back-lot owners hoping to establish a right to make use of waterfront property. Such a use is, obviously and vastly distinguishable from the case at bar, entirely optional. Gaining actual access to the property on which one lives is not.

[8] Plaintiffs have contended that ATVs, or all-terrain vehicles, are illegal to use on the Shehan portion of Island Shore Drive because they are not allowed to be used on roads. We express no opinion as to that point, but we note that it is common knowledge that ATVs can be considerably louder than motor vehicles, or at least generate a substantially different kind of noise, are typically used for recreation rather than truly for transportation, and may cause unique damage to an unpaved road surface. We do not hold that they are or are not permissible, per se, but we leave it to the parties on remand to evaluate their legality and whether they could ever be permissible. Rather, we hold only that the use of an ATV on the Shehan portion of Island Shore Drive for recreational purposes is absolutely not permitted by the easement.

egress does, consistent with other reasonable concessions made by plaintiffs in their depositions, extend to reasonable invitees, such as delivery vehicles, emergency vehicles, utility workers or contractors, or guests. We note that *some* defendants did provide direct evidence that they personally, or they and their direct predecessors, had used Island Shore Drive for at least the requisite period, but we are not persuaded that the evidence demonstrates a greater use than for ingress and egress.

Plaintiffs contend that the trial court should not have dismissed their claims for trespass and for nuisance. On the basis of our holdings above, we agree in part. Clearly, defendants did not commit a trespass by using Island Shore Drive for ingress and egress. However, plaintiffs' trespass claim also included allegations that defendants damaged their property *outside* the easement, and furthermore, as noted, using Island Shore Drive for recreational purposes exceeds its scope. "Activities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate." *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997). Conversely, a dominant estate holder "has the privilege to do such acts as are necessary to make effective the enjoyment of the easement, unless the burden upon the servient tenement is thereby unreasonably increased." *Mumrow v Riddle*, 67 Mich App 693, 699; 242 NW2d 489 (1976). The touchstone being reasonableness under the circumstances and what amounts to a balancing test, *id*. at 699-700, and in light of the present procedural posture of this matter, we are not in a position to evaluate whether defendants have overburdened the easement.

Likewise regarding the nuisance claim, it is difficult for us to understand how defendants can have created a nuisance by failing to maintain any part of Island Shore Drive, in light of plaintiffs' failure to articulate how they are obligated to do so and concession that they themselves damaged the road surface and objected to collective maintenance of the roadway through use of a special assessment district. Nevertheless, they also alleged that defendants engaged in acts of gratuitous speeding, honking horns, spinning tires, and otherwise generating disturbances. Noise *can* constitute a nuisance, depending on its character, volume, time, duration, and other circumstances. *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 536; 158 NW2d 463 (1968). Again, we are not in a position to evaluate most of the real merits of this claim.

We find that the trial court clearly was correct in dismissing *some* of plaintiff's trespass and nuisance claims, but we conclude that the trial court went too far in dismissing them in their entirety. We lack a sufficient record to determine the merits of the remainder of plaintiff's claims. Therefore, consistent with the above paragraph, we partially vacate the trial court's dismissal of plaintiff's trespass and nuisance claims, and we remand those for further proceedings consistent with this opinion. Consequently, it is unnecessary for us to address plaintiffs' motion for reconsideration. While this result may not be consistent with the most restrictive, narrow, and harsh reading of applicable precedent theoretically possible, we find it dictated by a *fair* reading thereof and supplemented by the non-binding but certainly not irrelevant equities of the situation when viewed as a whole.

We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN LAMKIN and STEVE LAMKIN,

Plaintiffs-Appellants,

v

EUGENE HARTMEIER, CYNTHIA HARTMEIER, KEVIN HARTMEIER, DENNIS MCCOMB, GLORIA MCCOMB, DANIEL ENGRAM, DANIELLE ENGRAM, JAMES BEAUDOIN, CECILE LAUDENSLAGER, ANGELA CHRISTIE, KIMBERLY KRASKA, JOAN BEAUDOIN, AARON KIRBY, DAMON HARTMEIER, DENISE ENGRAM, DEANN ENGRAM, DEREK ENGRAM, CATHERINE BARRETT,

Defendants-Appellees,

and

RONALD THYBAULT and the Estate of MARY WECKESER,

Defendants.

UNPUBLISHED
September 1, 2016

No. 326986
Livingston Circuit Court
LC No. 12-026600-NZ

Before: FORT HOOD, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

GADOLA, J. (*dissenting*).

I respectfully dissent. Although I agree that defendants failed to present sufficient evidence to establish an easement by necessity over Island Shore Drive, I strongly disagree that all of the defendants presented clear and cogent evidence establishing a prescriptive easement over the roadway. I further disagree with the majority's conclusion that the trial court erred by dismissing plaintiffs' nuisance claim in its entirety.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This case involves a dispute over the use of a private dirt road, Island Shore Drive, which runs along the northern shore of Oneida Lake in Pinckney, Michigan, and provides ingress and egress to M-36 for multiple lots on the northern side of the lake. In the late 1800s, Thomas Shehan owned a 40-acre parcel of property bordering the northwest shore of Oneida Lake. He split the property into 10 lots and deeded an express easement, now known as Island Shore Drive, through each lot to provide access to the main roadway. In 1922, a portion of property on the northeast side of the lake was platted into Cady's Point Comfort Subdivision. In 1933, another portion of land on the northeast shore was platted into Island Lake Shores Subdivision. Some of the lots in Cady's Point and the lots composing Island Lake Shores were bordered by Lake View Drive, which now connects into Island Shore Drive.[1]

According to plaintiffs, all of the lots in Cady's Point and Island Lake Shores previously had access to main roads through other unrelated properties. At some point before plaintiffs purchased their two Shehan lots in 1980, the lots in Cady's Point and Island Lake Shores became landlocked, and the lot owners began using Island Shore Drive for ingress and egress to M-36. An express agreement allowing the Cady's Point and Island Lake Shores lot owners to use Island Shore Drive was apparently never executed.

Plaintiffs asserted that at the time they purchased their property in 1980, there were only 14 year-round homes using Island Shore Drive, but by 2008, 29 year-round homes relied on the road for ingress and egress to M-36. As traffic increased, plaintiffs attempted to control the speed of vehicles using Island Shore Drive and the use of recreational vehicles by subdivision lots owners. On December 7, 2004, plaintiffs sent a memo to the lot owners in Cady's Point and Island Lake Shores, asserting that they had acquired "a **very limited** use through prescription" of Island Shore Drive for ingress and egress to M-36, which did not include recreational use. In 2005, plaintiffs carved inverted speedbumps (ruts) into the portion of Island Shore Drive running through their property, and placed poles in concrete blocks along the roadway. Plaintiffs asserted that after they attempted to control the use of Island Shore Drive, defendants engaged in numerous acts of harassment and retaliation against them.

In February 2012, plaintiffs filed a complaint against defendants, asserting a claim of nuisance for defendants' alleged failure to maintain and repair the roadway, speeding in excess of plaintiffs' posted speed limit, creating unnecessary noise when passing through plaintiffs' property, committing acts of trespass, and unreasonably interfering with plaintiffs' enjoyment of

[1] In 1949, the Livingston County Road Commission passed a resolution purporting to change the name of Lake View Drive to Island Shore Drive to match the name of the private road running through the Shehan lots, but this was apparently ineffective because in 2005, the Hamburg Township Board of Trustees passed a second resolution changing the name of Lake View Drive to Island Shore Drive. This opinion refers to Lake View Drive, the current easterly portion of Island Shore Drive, by its original name to differentiate it with the westerly portion of Island Shore Drive running through the Shehan lots.

their land.[2] Plaintiffs also asserted a claim of trespass and malicious destruction of property, alleging that defendants destroyed their easement pole markers, trees, and fauna surrounding the roadway, and improperly used the road for driving recreational vehicles and snowmobiles, walking, walking dogs, and dumping trash and fecal matter. Plaintiffs lastly asserted a claim of intentional infliction of emotional distress (IIED) stemming from defendants' actions.

In January 2013, plaintiffs filed a motion for declaratory and injunctive relief, asking the court to prevent defendants, their families, and their invitees from

> engaging in acts of trespass, nuisance, and malicious destruction of property including, but not limited to, littering, speeding, spinning of tires, the making of loud noises, the making of obscene gestures, dog walking, use of mopeds, use of ATVs, driving vehicles off the driveway, the destruction of the [plaintiffs'] property and fauna, and recreational walking, and to limit their activity to driving motor vehicles through [plaintiffs'] property at a safe speed not in excess of the posted fifteen miles per hour.

In March 2013, the Hartmeier defendants filed a motion to consolidate plaintiffs' action, Case No. 12-26600-NZ, with another case, Case No. 13-27319-CH, in which property owners within Cady's Point and Island Lake Shores brought a quiet-title action against plaintiffs and other property owners along Island Shore Drive, asserting that they had acquired an easement by necessity and prescription to use the roadway. On March 14, 2013, the trial court entered an order consolidating the cases.

Plaintiffs filed a supplemental memorandum in support of their motion for declaratory and injunctive relief, and against the quiet-title action, arguing that the Cady's Point and Island Lake Shores lot owners could not establish an easement by necessity because they did not share a common grantor with the owners of the Shehan lots. Plaintiffs further argued that, even if defendants could establish an easement by prescription, the majority of their actions on the roadway would not fall within the scope of such an easement. Following a hearing on plaintiffs' motion, the trial court denied plaintiffs' request for declaratory and injunctive relief and ordered the parties "to refrain from impeding or otherwise interfering with the use of the easement."

Thereafter, several defendants in Case No. 12-26600-NZ filed motions for summary disposition. They argued that plaintiffs' trespass claim should fail because defendants developed use rights in Island Shore Drive by prescription and necessity, which Mary Ann acknowledged in a deposition and in her 2004 memo, and their use of the roadway by walking and other forms of travel did not impose a greater burden on the servient estate than vehicular travel. Several defendants argued that the plat maps for Cady's Point and Island Lake Shores provided access

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[2] The majority opinion gratuitously notes plaintiff Mary Ann Lamkin's litigiousness and her involvement in unrelated civil and criminal legal matters concerning the dispute over the use of Island Shore Drive. I fail to see the relevance of those matters to the legal issues before us in this case. Whether plaintiff Mary Ann Lamkin is or is not a commendable person should have no bearing upon the matter now under this Court's consideration.

via Island Shore Drive, and the township acknowledged this right by adopting resolutions changing the name of Lake View Drive to Island Shore Drive. Regarding the nuisance claim, defendants argued that plaintiffs had not demonstrated significant harm resulting from defendants' conduct, and plaintiffs destroyed the surface of the roadway by their own actions. Further, defendants argued that none of their actions rose to the level of extreme and outrageous behavior necessary to sustain an IIED claim. Some defendants noted that MCL 600.5805(10) provides a three-year limitations period for trespass, nuisance, and IIED claims, yet plaintiffs relied on conduct that occurred more than three years before they filed their complaint.

Plaintiffs filed an omnibus response to defendants' motions and renewed their motion for declaratory and injunctive relief, arguing that an easement by necessity did not exist because they did not share a common grantor with defendants. They argued that each property owner within Cady's Point and Island Lake Shores was required to individually establish a prescriptive easement, but the Hartmeiers, Engrams, and McCombs did not own their respective lots for the prescriptive period, and only the McCombs filed any documentation from their predecessor-in-title. Additionally, they argued that the Cady's Point and Island Lake Shores plat maps did not create a right to use Island Shore Drive because the roadway was not within the plats and the developer did not own the land underlying Island Shore Drive.

At a hearing on the parties' motions, the trial court concluded that defendants made "a prima facie showing that an easement by prescription exists," relying in part on Mary Ann's statement in her deposition that "from 1980 to 2005 all of the landowners . . . used Island Shore Drive as a means across their property by numerous modes of transportation." The court concluded that even if plaintiffs granted defendants express permission to use the roadway in their 2004 memo, "defendants or their predecessors in interest used Island Shore Drive continuously from 1980 to 2004, 24 years." The court also concluded that "any significant interference with the use of the plaintiffs' property was caused by plaintiffs' own actions" and that defendants' conduct "was not so outrageous in character or so extreme in degree as to go beyond all possible bounds of decency." Therefore, the trial court granted defendants' motions for summary disposition regarding plaintiffs' nuisance, trespass, malicious destruction of property, and IIED claims pursuant to MCR 2.116(C)(10), and denied plaintiffs' renewed motion for declaratory and injunctive relief. The court then issued a written order to this effect, stating that defendants "have an easement by prescription and by necessity over that portion of Island Shore Drive which extends through the property owned by Plaintiffs," and asserting that the order "resolves the last pending claim and closes . . . Case No. 12-26600-NZ."

Plaintiffs filed a motion for reconsideration, accompanied by a 32-page affidavit from Mary Ann. Defendants objected to plaintiffs' motion and filed a joint motion to strike Mary Ann's affidavit, arguing in part that the affidavit was improper because it was based on facts known before the trial court issued its decision granting defendants' motions for summary disposition. Following a hearing, the court granted defendants' motion to strike the affidavit, and subsequently issued an opinion and order denying plaintiffs' motion for reconsideration.

II. STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006). In reviewing a motion

under MCR 2.116(C)(10), courts consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in a light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant a motion for summary disposition if the evidence shows that there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

III. TRESPASS CLAIM

Plaintiffs first argue that the trial court erred by dismissing their trespass claim[3] against defendants because defendants did not establish an easement over Island Shore Drive by either necessity or prescription, and even if they did, defendants' use exceeded the scope of the easement. Under Michigan law, "[r]ecovery for trespass to land . . . is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Wiggins v City of Burton*, 291 Mich App 532, 555; 805 NW2d 517 (2011) (citation and quotation marks omitted). "Once such an intrusion is proved, the tort has been established, and the plaintiff is presumptively entitled to at least nominal damages." *Id.* In other words, trespass produces liability regardless of the degree of harm caused by the invasion. *Id.* Permission or authority to enter land constitutes a defense to a claim of trespass. *Boylan v Fifty Eight, LLC*, 289 Mich App 709, 723; 808 NW2d 277 (2010). However, a trespass may occur if the user's activities exceed the scope of permission or authority. *Id.*; see also *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997) (noting that activities exceeding the "reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate").

"An easement is a right to use the land of another for a specific purpose." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). "An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement." *Schadewald*, 225 Mich App at 35. In the absence of an express easement, an easement can be created by operation of law, including an easement by necessity. *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). An easement by necessity arises if "an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel." *Id.* Thus, an easement by necessity "[1] may arise either by grant, where the grantor created a landlocked parcel in his grantee, or [2] it may arise by reservation, where the grantor splits his property and leaves himself landlocked." *Id.* at 172-173.

In this case, I agree that defendants did not present any evidence showing that the property underlying Island Shore Drive and the property making up Cady's Point and Island Lake Shores was ever owned by a common grantor. Therefore, the trial court erred by concluding that defendants established an easement by necessity over Island Shore Drive.

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[3] In their complaint, plaintiffs jointly titled their trespass claim as "Trespass/Malicious Destruction of Property." As defendants pointed out below, malicious destruction of property is a criminal, not a civil, offense. See MCL 750.377a.

I disagree, however, with the majority's conclusion that each of the defendants in this case established an easement by prescription over Island Shore Drive. "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). Adverse use is use inconsistent with the rights of the owner, without permission asked or given, and such use as would entitle the owner to a cause of action for trespass. *Id.* at 681. Continuous use does not necessarily require constant use, and depending on the nature and character of the right claimed, seasonal use may constitute continuous use. See *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). However, the use must "be in keeping with the nature and character of the right claimed." *Id.* The party attempting to establish a prescriptive easement bears the burden of proof by clear and cogent evidence. *Killips*, 244 Mich App at 260.

A party attempting to establish a prescriptive easement may "tack" on the possessory period of his or her predecessors-in-title to achieve the 15-year period by showing privity of estate. *Id.* at 259. "This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Id.* (citations omitted). As our Supreme Court explained in *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964),

> [I]t has long been the rule in Michigan that the statutory period of possession or use[] necessary for obtaining title by adverse possession or easement by prescription is not fulfilled by tacking successive periods of possession or use[] enjoyed by different persons in the absence of privity between those persons[,] established by inclusion by reference to the claimed property in the instruments of conveyance or by parol references at time of conveyances.

Nothing in Michigan law permits "collective tacking," by which a party asserting a right to an easement by prescription may rely on the activities of third-parties to establish an easement without showing privity of estate between them. See *Killips*, 244 Mich App at 259.[4] Rather, a party attempting to establish a prescriptive easement must individually show entitlement to such an easement either by his or her individual conduct, or by tacking on his or her use with the use of a predecessor-in-title and proving privity of estate. *Id.*

In connection with this requirement the majority opinion states, "We have found no published opinions expressly addressing the extent to which a party seeking to establish an easement by prescription may rely on uses made by neighbors . . . ." This is unsurprising, given that it is the wrong inquiry. Whether an inchoate group of neighbors or predecessors-in-interest have used the property for an extensive period of time, as the majority asserts was the case here, is simply irrelevant. This is because collective tacking is not permitted under Michigan law, a

[4] See also *Keiser v Feister*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 282531) (holding that a group of neighbors could not rely on their collective activities to establish the prerequisites of a prescriptive easement).

point the majority seems to acknowledge in its discussion of *Keiser v Feister*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 282531). Rather, as both *Siegel*, 373 Mich at 425, and *Killips*, 244 Mich App at 259, make clear, *each landowner* must individually establish, through clear and cogent evidence, its own entitlement to a prescriptive easement through either its own conduct, or by tacking its use to its predecessor-in-title *and* proving privity of estate.[5] The fact that there is circumstantial evidence that *someone*—even an unnamed someone who used to live on or own the property—had been using Island Shore Drive for ingress and egress, whether for 10, 20, or 100 years, has no legal bearing upon the ability of *these defendants* to use the road for ingress and egress.

In this case, Cady's Point was platted in 1922 and Island Lake Shores was platted in 1933. The record does not reveal when individual lots within the two subdivisions were improved with houses. Although there may have been lot owners within the subdivisions who used Island Shore Drive as early as 1922 or 1933 respectively, defendants cannot rely on this fact to establish the prescriptive right of every lot owner within the two subdivisions to use Island Shore Drive. Likewise, although Mary Ann stated in her deposition that some neighbors used Island Shore Drive for various purposes without objection from her between 1980 and 2005, this does not suggest that every defendant involved in the current lawsuit is entitled to a prescriptive easement over the roadway, particularly when the record shows that many lots were not developed with homes until after plaintiffs purchased their property in 1980. Accordingly, I believe the trial court erred to the extent it concluded that defendants established a collective prescriptive easement over Island Shore Drive.

Regarding whether individual defendants satisfied the requirements to establish a prescriptive easement over the roadway, Joan and James Beaudoin both offered affidavits in support of their motion for summary disposition, in which they stated that they purchased their home in 1986, and continuously used Island Shore Drive without permission by walking and motorized and non-motorized transportation until 2004 or 2005. Cecile Laudenslager stated in an affidavit offered in support of her motion for summary disposition that she purchased her home in 1972 and continuously used Island Shore Drive without permission by various modes of transportation, including motorized and non-motorized travel and walking, until 2004 or 2005. Angela Christie also offered an affidavit in support of her motion for summary disposition, in which she stated that she purchased her home in 1987 and continuously used Island Shore Drive without permission for motorized and non-motorized travel, and for walking with and without her dog, until 2004 or 2005. The trial court did not err by concluding that these defendants established a prescriptive easement over Island Shore Drive because they provided evidence that they engaged in open, notorious, adverse, and continuous use of the roadway for a period in excess of 15 years.

In support of her motion for summary disposition, Kimberly Kraska provided affidavits in which she explained that her father purchased her home in 1960. She asserted that she began

[5] The majority opinion is notable for its failure to address the holdings in *Siegel* and *Killips*, which are binding upon this Court.

continuously using the roadway in the 1970s, but did not begin living in her home year round until 1990. Kraska's claim of continuous year-round use beginning in the 1970s appears to be inconsistent with her statement that she did not begin living in her home full-time until 1990. Kraska admitted in her affidavit that plaintiffs gave permission to use the roadway in 2004 or early 2005. Although seasonal use may be sufficient to satisfy the continuous use requirement to establish a prescriptive easement, this is only the case if the seasonal use is consistent with the nature and character of the right claimed. *Dyer*, 32 Mich App at 344. In this case, Kraska is claiming a year-round right to use Island Shore Drive, rather than a seasonal right. Although Kraska established at least a seasonal right to use Island Shore Drive for certain purposes, it is not clear that she used the roadway on a year-round basis for the necessary 15-year period when she did not begin living in her home full-time until 1990, and admitted that plaintiffs granted permission to use the roadway in 2004 or early 2005. Therefore, in my opinion, the trial court erred by concluding that Kraska conclusively established a year-round right to use Island Shore Drive.

Plaintiffs argue that, even if some defendants are able to establish a prescriptive easement over Island Shore Drive, which I conclude the Beaudoins, Laudenslager, and Christie have done, and Kraska has done for at least seasonal use, the scope of their easements should be limited to using vehicles for ingress and egress to M-36 and should not include walking, walking with dogs, riding bikes, and operating any form of non-vehicular transportation on the roadway. I disagree. "A prescriptive easement is generally limited in scope by the manner in which it was acquired and the 'previous enjoyment.' " *Heydon v MediaOne*, 275 Mich App 267, 271; 739 NW2d 373 (2007). "One who holds a prescriptive easement is allowed to do such acts as are necessary to make effective the enjoyment of the easement unless the burden on the servient estate is unreasonably increased; the scope of the privilege is determined largely by what is reasonable under the circumstances." *Id*. In my estimation, walking and other mechanized forms of travel do not place a greater burden on plaintiffs' estate than vehicular travel. Therefore, I do not believe the trial court erred by concluding that these uses fell within the scope of the easements established by the above-mentioned defendants.

Regarding the other defendants, in support of their motion for summary disposition, the Hartmeiers presented a deed showing that they purchased their home in 1999, and affidavits in which they stated that they continuously used Island Shore Drive for a variety of purposes without permission until plaintiffs issued their 2004 memo. Accordingly, the Hartmeiers demonstrated only 5 years of adverse use of Island Shore Drive, and they did not present any evidence regarding their predecessor-in-title's use of the roadway. Further, the Hartmeiers did not present evidence showing that their right to use Island Shore Drive was conveyed by deed or oral representations at the time of transfer to prove privity of estate for tacking purposes.

Again, a party may only tack on the possessory period of a predecessor-in-title by showing privity of estate. See *Killips*, 244 Mich App at 259. Privity can be shown either by (1) including a description of the easement in a deed or (2) oral representations at the time of

conveyance. *Id.*[6] The majority argues that nothing in Michigan law requires that "proof of the requisite privity with predecessors" be based solely on direct, as opposed to circumstantial, evidence. However, in this case, there is simply no evidence, direct or circumstantial, demonstrating privity of estate, as it is currently defined by Michigan law, between the Hartmeiers and their predecessors-in-title. Therefore, the trial court erred by concluding that the Hartmeiers conclusively established a prescriptive easement over Island Shore Drive, such that they were entitled to summary disposition on plaintiffs' trespass claim.

In their brief in support of summary disposition, the Engrams asserted that they and their predecessors-in-title used Island Shore Drive without permission for more than 15 years. Daniel Engram stated in an affidavit that he and his wife purchased their home in 2000 from Robert Missel, and Missel died in 2009. He further claimed that plaintiffs did not object to their use of Island Shore Drive until 2008 when he received a letter from plaintiffs' attorney. The Engrams did not offer evidence regarding Missel's specific use of Island Shore Drive, and they did not offer any evidence, direct or circumstantial, to show privity of estate by demonstrating that their right to use the roadway was transferred by deed or oral representations at the time of conveyance. See *Killips*, 244 Mich App at 259. Therefore, the trial court erred by concluding that the Engrams conclusively established a prescriptive easement over Island Shore Drive.

In support of their motion for summary disposition, the McCombs stated that they purchased their home in 2003 and used Island Shore Drive continuously after that time. They also provided an affidavit from Phyllis Davenport, their predecessor-in-title, who purchased the property in 1992, and stated that she and her family used Island Shore Drive by any mode of transportation they deemed appropriate without limitation during their ownership period. In their own affidavits, the McCombs stated that plaintiffs did not object to their use of the roadway until 2008. Although the period between Davenport's purchase of the property in 1992 and plaintiffs' purported objection to the McCombs' use of Island Shore Drive in 2008 exceeded 15 years, the McCombs did not offer any evidence, direct or circumstantial, to prove privity of estate, which

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[6] This Court applied an exception to these requirements in *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 41; 792 NW2d 40 (2010), which held that a party could tack on the use of their predecessor-in-title in the absence of descriptions in the deed or parol statements at the time of transfer because the conveyance of title did not involve "an arms-length, third-party transfer," but rather involved property owners who had "visited and remained on the property and had used the pathway for many years before their acquisition of the title to the property." Under those facts, this Court held that the requirement of parol statements could "be satisfied in the limited circumstances where the tacking property owners are 'well acquainted' and there is clear and cogent evidence that the predecessors-in-interest 'undoubtedly' intended to transfer their rights to their successors-in-interest, for example, by showing that the successors had 'visited and remained on the property and had used it for many years prior to their acquisition of the title to the property.' " *Id.* at 41-42 (citation omitted). I find *Matthews* inapplicable to the case at hand because none of the defendants have shown that they acquired title to their property by any means other than arms-length, third-party transactions, nor have they shown that they were "well acquainted" with the land for many years before acquiring title.

was required to tack on the possessory period of their predecessor-in-title. Proving privity of estate required the McCombs to show that either (1) the right to use Island Shore Drive was included in their deed, or (2) the right to use the roadway was orally represented at the time of conveyance. See *Killips*, 244 Mich App at 259. Because the McCombs did not present evidence showing privity of estate, the trial court erred by concluding that they established a prescriptive easement over Island Shore Drive.[7]

In sum, the trial court properly dismissed plaintiffs' trespass claim with regard to the Beaudoins, Laudenslager, and Christie because these defendants presented sufficient evidence to establish a year-round prescriptive right to use Island Shore Drive and their use of the roadway did not exceed the scope of their prescriptive easements. However, the trial court erred by concluding that Kraska presented sufficient evidence to conclusively establish a year-round prescriptive easement, and that the Hartmeiers, Engrams, and McCombs presented sufficient evidence to establish a prescriptive easement over Island Shore Drive. Accordingly, in my opinion, the court improperly dismissed plaintiffs' trespass claim with respect to those defendants.

Plaintiffs also argue that the trial court erred by dismissing their trespass claim because they "alleged trespassory conduct occurring outside of the boundaries of [Island Shore Drive], where it is not even arguable that Defendants had a right to be." Plaintiffs further argue that defendants could not have acquired a right to destroy plaintiffs' property. Plaintiffs do not specify the alleged acts of trespass that occurred outside the boundaries of Island Shore Drive, and they do not specify what property defendants destroyed that could have supported a claim of trespass. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). To the extent plaintiffs argue that certain acts of trespass occurred outside the boundaries of Island Shore Drive, or that defendants' destruction of their property was sufficient to sustain their trespass claim, I would consider this argument abandoned on appeal.

IV. NUISANCE CLAIM

Plaintiffs argue that the trial court erred by dismissing their nuisance claim. A defendant may be liable for private nuisance if "(a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and

[7] On appeal, several defendants argue that Mary Ann's statements in her deposition and the 2004 memo, suggesting that limited easements by prescription and necessity existed over Island Shore Drive, are binding and support the trial court's ruling below. However, an admission or concession made by the parties or their attorneys regarding a question of law is not binding. See *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). Mary Ann's statements in this regard were non-binding legal conclusions and do not constitute an independent reason to affirm the trial court's ruling.

unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct." *Capital Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 429; 770 NW2d 105 (2009) (citation and quotation marks omitted). In their complaint, plaintiffs alleged that defendants created a nuisance by failing to maintain the portion of Island Shore Drive running across plaintiffs' property, by speeding in excess of the posted speed limit, and by committing various unspecified acts of trespass. Plaintiffs offer no authority to suggest that defendants were obliged to repair the portion of Island Shore Drive running across plaintiffs' land, and they do not explain how defendants' purported failure to maintain this portion of the road interfered with their enjoyment of their property or caused significant harm. Additionally, plaintiffs admitted that they destroyed the surface of the roadway by carving out inverted speedbumps, and they objected to collective maintenance of the roadway through the use of a special assessment district. Plaintiffs do not explain how defendants' alleged acts of speeding, honking horns, spinning tires, and other similar conduct caused them significant harm. In my opinion, the trial court properly dismissed plaintiffs' nuisance claim because they failed to demonstrate the necessary elements to sustain their claim.

V. MOTION FOR RECONSIDERATION

Lastly, plaintiffs argue that the trial court erred by striking Mary Ann's affidavit without holding an evidentiary hearing and by refusing to treat their motion for reconsideration as a motion for relief from judgment under MCR 2.612(C) because the affidavit demonstrated that defendants perpetrated a fraud on the trial court. Plaintiffs cite no authority suggesting that the trial court was required to treat their motion for reconsideration as a motion for relief from judgment, and they do not explain what fraud occurred or how Mary Ann's affidavit established that fraud. Therefore, I would consider this issue abandoned on appeal. *Mitcham*, 355 Mich at 203.

For the reasons cited above, I would affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. While the outcome I would reach in this case may not be as "tidy" as what the majority seems to favor, I believe it is dictated by the controlling precedent. The majority implies that my approach constitutes a narrow, restrictive, and harsh reading of the law and suggests that its conclusion represents a more fair reading thereof in light of the equities of the situation. However, the majority reaches this equitable outcome by disregarding *Siegel*, 373 Mich at 425, and *Killips*, 244 Mich App at 259, which require a party attempting to establish a prescriptive easement by tacking to prove privity of estate. I do not believe we may take an equitable approach to this case in light of the controlling legal precedent. Therefore, I dissent.

/s/ Michael F. Gadola

STATE OF MICHIGAN

COURT OF APPEALS

KIM and CONNIE METHNER,

Plaintiffs-Appellants,

v

VILLAGE OF SANFORD,

Defendant/Cross-Defendant-Appellee,

and

MID-VALLEY AGENCY, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

MALLEY CONSTRUCTION, INC.,

Defendant.

UNPUBLISHED
August 23, 2016

No. 326781
Midland Circuit Court
LC No. 12-009082-CH

Before: OWENS, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

In this prescriptive easement case, plaintiffs' appeal centers on the trial court's order denying plaintiffs' motion for partial summary disposition and granting defendants' motions for summary disposition.[1] For the reasons stated in this opinion, we reverse the trial court's order and remand for entry of partial summary disposition in plaintiffs' favor.

[1] Defendant Malley Construction, Inc. settled with plaintiffs and has not participated in this appeal. We use "defendants" in the plural when referring to Village of Sanford and Mid-Valley Agency, Inc. together.

This appeal involves three adjacent parcels of property along West Saginaw Street in the Village of Sanford, Michigan. The first parcel is owned by defendant Mid-Valley Agency, Inc., and Mid-Valley's business building is on it. The record reflects that at one time a post office was on the lot. Adjacent to the first lot is a vacant parcel that is also owned by Mid-Valley. Plaintiffs refer to the vacant parcel as the "Access Parcel." The third parcel is owned by plaintiffs and is referred to as the "Studio Building" because a photography studio is located on it. The record reflects that plaintiffs acquired the Studio Building parcel in 2011 from Terry Howson. At his deposition, Howson testified that his family had owned the parcel for years, and that he had taken possession of it from his grandparents in the late 1960s or early 1970s. Howson, who was 70 years old at the time he was deposed, testified that the building on the parcel had been a meat market and that he had helped his uncle and grandfather by delivering meat for the business since he was 8 or 10 years old.

In the summer of 2011, the Village of Sanford developed plans to reconstruct and improve its downtown "streetscape," including Saginaw Street. In order to do so, the Village acquired easements for the sidewalks in front of the parcels at issue in this case. Ultimately, the Village decided to put a "curb bump-out," i.e. a wider sidewalk with no parking spaces, and a crosswalk directly in front of the access parcel. As a result, the curb cut that allowed vehicular traffic to the rear of the buildings was removed. Although plaintiffs attempted to stop the project, they received no response from the Village. With the closure of the access drive, plaintiffs had no access to the rear of their building, which they had just renovated to allow handicap access. In their complaint, plaintiffs alleged that they had a prescriptive easement in the access parcel and that the Village of Sanford's streetscape project had interfered with their use of the easement. Plaintiffs moved for partial summary disposition on the issue of the easement's existence, and defendants also moved for summary disposition.

The trial court denied plaintiffs' motion and granted summary disposition in favor of defendants, finding that there was no prescriptive easement on the access parcel. Relying on the decision *Frandorson Props v Northwestern Mut Life Ins Co*, 744 F Supp 154 (WD Mich, 1990), and *Wood v Denton*, 53 Mich App 435; 219 NW2d 798 (1974), the trial court concluded that Howson's use of the access parcel "was mutual, although not permissive, and not adverse for the duration of his ownership." As a result, the trial court dismissed Count I of plaintiffs' complaint. Initially, the trial court found that questions of fact remained regarding the scope of the sidewalk easements plaintiffs and Mid-Valley had granted the Village, so the court did not grant summary disposition on Counts II and III of plaintiffs' complaint. The Village moved for reconsideration, and, on reconsideration, the trial court concluded that Counts II and III were derivative of Count I. The court therefore dismissed the remaining counts in plaintiffs' complaint. Thereafter Mid-Valley's cross-claim against the Village was dismissed by stipulation. This appeal followed.

Plaintiffs argue on appeal that the trial court erred in denying their motion for partial summary disposition and in granting defendants' motions for summary disposition.[2] We agree.

[2] We review de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A (C)(10) motion

In *Mulcahy v Verhines*, 276 Mich App 693, 700; 742 NW2d 393 (2007), we explained:

> A prescriptive use of land . . . is either
>
> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude. [citing 1 Restatement Property, 3d, Servitudes, § 2.16, pp 221–222; emphasis omitted).]
>
> An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years. MCL 600.5801(4). The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement. [*Mulcahy*, 276 Mich App at 699 (case citations and quotation marks omitted).]

"The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976); *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995). "Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder." *Mumrow*, 67 Mich App at 698; *Goodall*, 208 Mich App at 646. The party claiming the easement need not "make express declarations of adverse intent during the prescriptive period." *Mumrow*, 67 Mich App at 698; *Goodall*, 208 Mich App at 646. In Michigan, the prescriptive period is 15 years. MCL 600.5801(4); *Mulcahy*, 276 Mich App at 699.

Plaintiffs bought their property in 2011 and so have not used the access parcel long enough to claim a prescriptive easement based on their own ownership. However, if the use by plaintiffs' predecessor in title, Howson, satisfied the elements of a prescriptive easement, then plaintiffs acquired that easement when they purchased the property, even if it was not mentioned in the deed or the parties' dealings. See *Haab v Moorman*, 332 Mich 126, 143-144; 50 NW2d 856 (1952).

The trial court erred by failing to apply Michigan precedent, under which a presumption of hostile use arises when an alleged easement has been in use for longer than the statutory

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tests the factual sufficiency of the complaint, and "we consider the substantively admissible evidence actually proffered in opposition to the motion. Thus, when such a motion is properly brought, the nonmovant must . . . produce admissible support for its opposition in order to defeat the motion." *Id*. at 120 (citation and internal quotation marks omitted). Actions to quiet title are equitable and thus are also reviewed de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

period and the origin of that use is unknown. The trial court should have applied *Haab*, as clarified by *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985): "Once plaintiffs presented evidence that they had used the disputed land for over fifty years, the burden of producing evidence shifted to defendants to establish that plaintiffs' use was permissive." Although the trial court concluded that the *Frandorson* Court declined to apply the presumption because the way was "one of mere convenience" rather than a way of necessity, the Court in *Haab* and the Courts in several cases cited by *Haab* applied the presumption despite the fact that the cases did not involve a way of necessity. See *Haab*, 332 Mich at 139 ("An alley is a way of convenience"); *Loehr v Cochran*, 14 Mich App 345, 346; 165 NW2d 485 (1968); *Dyer v Thurston*, 32 Mich App 341, 343; 188 NW2d 633 (1971). Thus, binding caselaw clearly supports plaintiffs' assertion that all they had to establish to give rise to the presumption of hostile use is that the use was open, its origins are unknown, and that the use occurred for longer than the prescriptive period.

The trial court's application of the "mutual use" doctrine also was not in accord with binding Michigan law. Historically, the doctrine has been applied when owners of adjoining lots share a driveway that is partly on both (or all) parcels so that all the parcels are mutually burdened and benefited. See, e.g., *Wilkinson v Hutzel*, 142 Mich 674, 675; 106 NW 207 (1906); *Worden v Assiff*, 317 Mich 436, 439; 27 NW2d 46 (1947); *Wasilewski v Kowal*, 320 Mich 473, 474; 31 NW2d 697 (1948); *Banach v Lawera*, 330 Mich 436, 438; 47 NW2d 679 (1951). "Mutual" is not the same as simultaneous or concurrent; rather, it means "1. Generally, directed by each toward the other or others; reciprocal. 2. (Of a condition, credit covenant, promise, etc.) reciprocally given, received, or exchanged. 3. (Of a right, etc.) belonging to two parties; common." *Black's Law Dictionary* (10th ed). Thus, Howson's unilateral use of his neighbor's property without permission is not "mutual use" even if the neighbor was also using the property.

Howson's testimony established that the origins of the use of the access parcel were unknown and the use was already established when he was a child, some 60 years earlier. Thus, the use had continued for well past the prescriptive period of 15 years and no one knew if it began as a permissive use or a hostile use. Mid-Valley argues that Howson's testimony does not show anything more than permissive use; however, in order to make a prima facie showing that the use was hostile, all plaintiffs had to show was that the origins of the use were unknown and that the use had continued for more than the prescriptive period. *Widmayer*, 422 Mich at 290; see also 1 Restatement Property, 3d, Servitudes, § 2.16, comment *g*, pp 233-234, and Reporter's Note, pp 246-247 (citing *Widmayer*) ("The majority of states recognize a presumption of adverse use arising from evidence of use for the prescriptive period without evidence establishing that the initial use was permissive."). Given these requirements, Howson's testimony shows that the presumed hostile use might predate even his own possession, as his awareness of his grandparents' use (of unknown origin) began at least around 1951 through 1953 and was continuing when Howson took possession of the parcel 15 to 20 years later. Under these facts, plaintiffs sufficiently established a prima facie case that the presumption of hostile use applied in this case.

The Village of Sanford asserts that plaintiffs' use is the same as that of the general public because, according to plaintiffs' complaint, customers used the access parcel. However, even assuming that plaintiffs' customers equate with the general public, there was almost no *testimony* to this effect. Howson stated that only he, his wife, post office trucks, Mid-Valley's employees,

and the garbage truck used it: "The customers parked in front of the building mostly" and "Nobody as far as I know" used it otherwise. Moreover, Howson's use included receiving deliveries, which would be different from the use by the general public.

Once a plaintiff establishes a presumption of hostile use, the burden then shifts to those opposed to the easement to provide evidence that the use was permissive. *Widmayer*, 422 Mich at 290. Howson testified that, although he and his neighbors had never discussed it, he used the access parcel with their full awareness. The only evidence that permission had been granted was the statement in the affidavit of Mid-Valley's owner, who said he had expressly given Howson permission to use the parcel. But Mid-Valley acquired the access parcel in 1985, long after the prescriptive period had run in favor of Howson and his predecessors, and the silence of Mid-Valley's predecessors does not equate with *permission*, but with *acquiescence*.[3] Notably, the trial court expressly found, "[Howson's] use was mutual, *although not permissive*, and not adverse for the duration of his ownership." When the trial court expressly found the use was *not* permissive, under *Widmayer*, 422 Mich at 290, it should have at that point ended the analysis in plaintiffs' favor as a matter of law.

We reverse the trial court's order granting summary disposition in favor of defendants and remand for entry of an order granting plaintiffs' motion for partial summary disposition. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[3] "Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely." *Turner v Hart*, 71 Mich 128, 138; 38 NW 890 (1888); see also *Marr v Hemenny*, 297 Mich 311, 314; 297 NW 504 (1941). "One claiming a prescriptive easement must prove that use was with the owner's knowledge and acquiescence. In this context, acquiescence does not mean license or permission in the active sense but means passive assent or submission, quiescence, or consent by silence." 25 Am Jur 2d, Easements and Licenses in Real Property, § 44, p 714 (footnotes omitted). This definition of acquiescence differs from a mere failure to object and does not, by itself, constitute permission. See *Turner*, 71 Mich at 138.